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# Chapter 3: Personal Property Foreclosure

## CHAPTER 3 - PERSONAL PROPERTY FORECLOSURES

### 3. PERSONAL PROPERTY FORECLOSURES

#### 3.01 CHECKLIST

1. Is there a lease or written security agreement (see 3.2)?
2. Property valued less than \$15,000 (see 3.33)?
3. Filed where debtor or property located (see 3.34)?  
If not, transfer to proper county.
4. Is service proper (tack and mail only after attempting personal service) (see 3.39)?
5. Was answer timely filed within seven days or default opened within additional seven days (see 3.4)? If not, issue default judgment.
6. If no appearance for Defendant at hearing, issue default judgment.
7. <OPTIONAL: At call of the calendar you may wish to allow Plaintiffs to indicate if they believe no legal defense has been raised>.
8. If case continued beyond seven days from date of answer require payment of rent into court (see 3.53).
9. Examine answer. If no legal defense or counterclaim (see below) has been raised then verify absence of legal defense and prepare judgment (see 3.55). If counterclaim beyond jurisdiction of court (see 1.11) then transfer case.
10. Trial - Plaintiff must show:
  - a. Existence of lease or written security interest
  - b. Default in terms of contract.
11. Consider defenses and counterclaims.
12. If finding for Plaintiff, enter writ of possession and issue turnover order (no money judgment). Have Plaintiff elect remedy after writ (see 3.55).  
If finding for Defendant, dismiss complaint, may award money judgment on counterclaim.
13. Appeal procedure (see 3.54).

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## CHAPTER 3 - PERSONAL PROPERTY FORECLOSURES

**3.1 PURPOSE** - To recover personal property where there has been a violation of the terms of a LEASE or SECURITY AGREEMENT.

### 3.2 SECURITY AGREEMENTS

#### 3.21 Definition:

A form of interest in personal property - typically to secure payment of a loan or the balance of the purchase price where buying "on time".

#### 3.22 Requirements [OCGA 11-9-203]:

- A. Must be in writing and signed by the debtor - description of secured property must be attached; a signed security interest is an absolute prerequisite to foreclosure - sales receipts **referring** to a security agreement are insufficient proof [180 App. 607, 349 SE2d 826 (1986)];
- B. Must be given for value (not gift);

**AND**

- C. The debtor has rights to the collateral he/she is pledging.

NOTE - A person may have an **oral** security interest where he/she has possession of the property (e.g., a pawn shop). However, in that case the secured party would not be filing a foreclosure action. **Possession of an automobile title** is not enough to validate the oral pledge of an automobile as security [151 App. 424, 260 SE2d 380 (1979); 115 App. 483, 487, 154 SE2d 886 (1967)]. [OCGA 40-3-50 et seq. provides exclusive method for perfecting security interest, but only affects third parties, not the debtor and creditor. 167 App. 794, 307 SE2D 693 (1983)].

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### 3.23 May Be a Lease with an Option to Buy:

Whether such a lease is intended as a security agreement depends on the facts of each case - **however, whether a lease or a security agreement, a personal property foreclosure may be filed upon default.**

### 3.24 Collateral - Definition and Description:

- A. **Collateral** is the term given to designate personal property subject to a security interest. The most common types are: goods, instruments, chattel paper, documents, accounts, general intangibles, and rental property (personal property leased or rented in a rental transaction) [OCGA 44-14-230(b)(2); *see* OCGA 11-9-108].
- B. Legal sufficiency of description - a description is sufficient if it reasonably identifies the collateral by any method which is objectively determinable, including: specific listing, category, type, quantity, computational or allocational formula or procedure. **Exceptions:**
- Supergeneric descriptions such as “all the debtor’s assets” do not adequately describe property;
  - Property in consumer transactions, consumer goods, a security entitlement, a securities account, or a commodity account.

**CAUTION** - A *legally sufficient* description may not be sufficiently clear to enforce without a real danger of *tort liability* for conversion [284 App. 96, 642 SE2d 364 (2007) (general description of inventory and equipment of dental office where dentist borrowed property from his wife and fellow dentist)].

## 3.3 USE OF FORECLOSURE PROCESS

### 3.31 Self-help OK:

**Unlike dispossessionary actions**, unless otherwise agreed, a secured party or lessor has on default the right to take possession of collateral without judicial process if this can be done without a breach of the peace [OCGA 11-9-503].

### 3.32 Purposes:

To obtain possession of collateral or leased property and to foreclose debtor's interest in collateral.

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### 3.33 Jurisdiction:

Magistrate court has jurisdiction over foreclosures in which the value of the property claimed does not exceed \$15,000. Of course, a counterclaim exceeding the jurisdiction of the court may be filed requiring transfer to another court.

### 3.34 Venue:

A. Petition may be filed in the **county** where:

1. the debtor may reside;
- OR**
2. the secured property is located.

B. If property is located in more than one county, a writ of possession will apply only to property located in the county in which the writ is filed unless the debtor is also a resident of that county.

NOTE - A personal property foreclosure is not a "civil action" under GA. CONST. Art. 7, § 7, ¶ 7, and thus venue is proper in a county other than Defendant's county of residence [252 Ga. 563, 315 SE2d 428 (1984)].

### 3.35 Parties:

- A. PLAINTIFF may be a **lessor**, any person **who holds a security interest** under the Uniform Commercial Code (Title 11 OCGA) or part 4 of Title 44 of the OCGA. Plaintiff's agent or attorney may petition for a writ of possession (OCGA 44-14-230, 231).
- B. REAL PARTY IN INTEREST - the person whose interest is secured by the property sought is the proper party to petition for foreclosure.
- C. DEFENDANT - usually is the original debtor; may be a successor in interest or one in possession of the property [153 App. 614, 266 SE2d 293 (1980); 143 App. 840, 240 SE2d 212 (1977)].

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### 3.36 Scope of Claim - No Money Judgments:

No provision in the Personal Property Foreclosure Act allows a **money judgment** for the indebtedness in a consumer transaction; it only allows a writ of possession/foreclosure to be granted. An action must be filed for a money judgment with the summons and answer period for an ordinary Statement of Claim. A money judgment "may not be 'piggy-backed' into court using the special rules applicable to foreclosure actions..." [242 Ga. 1, 2-3, 247 SE2d 743 (1978)].

NOTE - **Commercial** transaction foreclosures **may** seek money judgments [OCGA 44-14-269]. A creditor might also seek a money judgment in a consumer transaction by joining it with a normal Statement of Claim and allowing thirty days to answer.

NOTE - It may nevertheless be appropriate to make a finding as to the amount of unaccelerated payments needed to be paid into court upon appeal for the debtor to remain in possession of the property [OCGA 44-14-235].

### 3.37 How to File - Requirements of Petition:

- A. Under oath before a notary, any judge, or other state or county official authorized to administer oaths - also OK if made outside the state [OCGA 44-14-231; 9-10-113]. Attestation of the official is prima facie evidence both of qualification to give oath and that it was properly done.
- B. Contain a statement of facts sufficient to make a prima facia showing that an **indebtedness is owed** which is
  - 1. secured by **described collateral** AND
  - 2. **in default**.

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### 3.38 Summons - [OCGA 44-14-232]:

- A. When petition provided for in OCGA 44-14-231 is made, the judge, magistrate or clerk shall grant or issue summons to the sheriff, his deputy or a marshal or constable of the county in which the debtor resides or the secured property is located.
- B. The summons requires the Defendant "to answer either orally or in writing within seven days from the date of the actual service unless the seventh day is a Saturday, a Sunday, or a legal holiday, in which case the answer may be made on the next day which is not a Saturday, a Sunday, or a legal holiday." [OCGA 44-14-232].
- C. The form of the summons is prescribed in OCGA 44-14-232.

### 3.39 Service of Summons - [OCGA 44-14-232]:

- A. Service is made in one of the following ways:
  - 1. Personal service on Defendant of summons attached to a copy of petition;
  - 2. If unsuccessful, by delivering summons and petition to any person sui juris residing on premises;

**OR**

  - 3. If no such person is found residing on premises after a reasonable effort, service may be had by **TACKING** a copy of summons and petition on the door of the premises, and on the same day as tacking, **MAILING** by first class a copy of summons and petition to Defendant at his/her last known address, if any, and making an entry of this action on petition filed in this case.

<p>NOTE - The debtor must advise the secured creditor of any change of address subsequent to the date of granting of the security interest [OCGA 44-14-232(e)].</p>
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- B. No jurisdiction in the absence of service in accordance with the statute unless Defendant has waived the defect. Actual notice of the pending action does not constitute waiver [144 App. 255, 240 SE2d 779 (1977)].



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### 3.4 ANSWERS AND DEFAULTS - [OCGA 44-14-233]

**3.41** Answer Oral or in Writing - If the Defendant answers orally, the substance thereof shall be endorsed by the court on the petition.

**3.42** Answer May Contain Any Legal or Equitable Defense or Counterclaim.

"Defenses that might be raised include payment, accord and satisfaction, usury, temporary disregard of contract terms, and denial of the security interest." [OCGA 44-14-233].

**3.43** If the Defendant Answers, a trial of the issues shall be had in accordance with the procedure prescribed for civil actions in courts of record. Every effort shall be made by the trial court to expedite a trial of the issues and place the case on the next available calendar. However, the trial shall not be held before seven days have elapsed from the date the Defendant files his/her answer.

**3.44** Time - If the Defendant fails to answer at or before **seven** days have expired, he/she is in default. If the seventh day is a Saturday, Sunday or legal holiday, the answer may be made on the next day which is not a Saturday, Sunday or legal holiday.

**3.45** Opening Default - The Defendant may open the default as a matter of right by making an answer within seven days **after** the date of the default, notwithstanding OCGA 9-11-55.

**3.46** Default Judgment - Enter judgment plus costs for the Plaintiff after the seven days to open default has passed [OCGA 44-14-233].

**3.47** No Money Judgment - Georgia courts have concluded that including a money award in a default judgment is permitted only when the secured party is seeking a writ of immediate possession, which applies only to commercial transactions and not to consumer transactions, as those terms are defined in the Code [242 Ga. 1, 2, 247 SE2d 743 (1978)]. The Defendant **can** recover a money judgement on a counterclaim.

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### 3.5 TRIAL, JUDGMENT AND APPEAL

#### 3.51 Time of Trial:

The trial may not be held sooner than seven statutory days from the date that the Defendant filed his/her answer. Every effort shall be made to expedite a trial of the issues and place the case on the next available calendar [OCGA 44-14-233].

#### 3.52 Procedures at Trial - are governed by OCGA 15-10-40 through 15-10-51. Jury trials are not permitted in magistrate courts [OCGA 15-10-41].

NOTE - Money judgments are normally not allowed (see [3.36](#)).

#### 3.53 Possession Pending Trial - [OCGA 44-14-234]

##### A. When payment into court required:

When the right to possession cannot be finally determined within two weeks from the date of service of the copy of summons, the Defendant shall be required to pay into court:

1. All past due amounts which are admitted to be due and for which there are no allegations of defenses or claims which, if proven, would offset said amounts alleged past due;

**AND**

2. All amounts of unaccelerated payments which become due after the issuance of the summons as said amounts of payments become due;

**PROVIDED**

3. In lieu of the payments, the Defendant shall be allowed to submit a receipt to the court indicating that the payments have been made to the secured creditor. If the amount of the payment due or to become due is in controversy, the court shall determine the amount to be paid into the court in the same manner as provided in paragraph (2) of this code section.

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### B. Determining amount to pay into court:

If the Plaintiff and the Defendant disagree as to the amounts actually due or to become due, the court shall set a hearing date to determine the amount to be paid into the court. At the hearing, the parties may submit to the court any evidence of the amounts actually due or to become due, including any security agreement and evidence of any claims or defenses arising out of the same transaction, for the purpose of establishing the actual amount of the payments to be paid into the registry of the court.

NOTE - Court MUST order payment amounts coming due after issuance of summons. **Unlike dispossessories**, past due amounts are ordered paid into court only as the court directs after considering evidence of Defendant's claims or defenses. Since this requires consideration of the entire case, there will seldom be any reason to delay trial of the case on the merits beyond this hearing. **Orders requiring payment into court remain relevant in appeals** [OCGA 44-14-235].

### C. Not final:

Unlike dispossessories, the writ of possession issued by the court for non-payment of sums into court is **not** a final judgment on the question of possession; instead, it "shall only affect the right of possession **pending** a final decision on the merits."

### D. When money retained in court:

As in dispossessories, monies not in controversy are paid out to Plaintiff; funds in controversy remain in the registry of the court pending final judgment [OCGA 44-14-234(5)].

### E. Effect of improper levy:

Wrongful levy does not invalidate writ; further, if officer making levy seizes property not described in writ and is not controlled or directed by Plaintiff and doesn't make error at Plaintiff's instigation, Plaintiff is not liable for wrongful levy [220 App. 188(4), 469 SE2d 222 (1996)].

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### 3.54 Appeal:

Final decisions of a magistrate may be appealed de novo to the state court or superior court [OCGA 15-10-41, 5-3-29]. The Defendant may remain in possession of the secured property while the appeal is in progress if he/she complies with the court's existing order concerning payments into the registry [OCGA 44-14-235].

### 3.55 Judgment, Levy and Execution - [OCGA 44-14-233, -236]

#### A. Issue writ of possession and turnover order:

Upon judgment for Plaintiff, court issues writ of possession and turnover order requiring Defendant or person in possession to turn over the property to the sheriff, marshal or constable, or advise the officer of the location. The form of the order is provided in OCGA 44-14-233(e). The order would be enforceable through contempt proceedings.

#### B. Option on execution - Once the court issues a writ of possession, the sheriff, deputy, marshal, or constable shall seize the property and, at the option of the secured party, either turn it over to the secured party or advertise and sell the property as in the case of levy and sale execution [OCGA 44-14-236].

#### C. **Plaintiff's election** to take property - If Plaintiff decides to take the property, his/her duties are governed by Article 9 of the Uniform Commercial Code (OCGA Chapter 11-9).

**If foreclosure occurs before all the debt or any portion thereof is due** (either under the procedure stated in OCGA 44-14-239 concerning an endangered security interest or circumstances stated in OCGA 44-14-238 concerning multiple debts secured by a single security interest), **it is the responsibility of the court** to control the disbursal of payments or sale of proceeds so as **to protect the lien of the debts not yet accrued** and to insure that the money is **not** paid over to the Plaintiff in fi fa until the debt becomes due [OCGA 44-14-238, -240].

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### **3.6 IMMEDIATE WRITS OF POSSESSION - [OCGA 44-14-260 through 44-14-269] Commercial Transactions Only:**

#### **3.61 Commercial Transaction Defined:**

A commercial transaction gives rise to an obligation to pay for goods sold or leased, services rendered, or money loaned for use in the conduct of a business or profession, and not for personal consumption [OCGA 44-14-260]. Commercial transactions are distinguished from consumer transactions.

#### **3.62 Requirement for Immediate Writ:**

A secured party seeking to foreclose an interest in personal property arising out of a commercial transaction is entitled to a writ of immediate possession if:

- A. Contents - the petition contains a statement of facts, under oath, by petitioner or his/her agent or attorney, sufficient to demonstrate that "it is within the power of the Defendant to waste, encumber, convert, convey, or remove from the jurisdiction of the court the property which is the subject matter of the petition or that petitioner's post-judgment remedy would be inadequate" [OCGA 44-14-262].
- B. Bond or waiver - the petitioner must either furnish a bond in the amount of his/her claim to indemnify Defendant against loss if the writ is wrongfully obtained, OCGA 44-15-263, or provide with the petition a waiver, signed by Defendant, in which Defendant clearly and unambiguously waives all rights to have notice prior to seizure by a creditor having an interest in the personal property of Defendant [OCGA 44-14-263, 44-14-260].

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### **3.63** If Requirements Not Met:

If all of the above requirements have not been met, the court may treat the petition as a motion for a writ of possession under OCGA 44-14-231.

### **3.64** Service:

When an immediate writ of possession has been granted, a copy of the petition, the affidavits, the waiver or bond, and the order shall be served as per OCGA 44-14-232 as if Plaintiff were filing an action under OCGA 44-14-231. Execution and levy proceed as if this were a consumer transaction under OCGA 44-14-23. [OCGA 44-14-266].

### **3.65** Answer and Counterclaim:

At any time prior to sale or other final disposition of the property, but not later than 30 days after service, the Defendant may appear and file any legal or equitable defense or counterclaim to the secured creditor's claim for writ of immediate possession. After filing of such defense or counterclaim, trial of relevant issues shall be had in accordance with the procedure described in courts of record [OCGA 44-14-267].

### **3.66** Defendant's Alternatives - at any time during which the Defendant may file an answer, the Defendant may:

A. File for a dissolution of the writ, which motion shall be granted unless the petitioner proves the grounds upon which the writ was issued;

**OR**

B. Pay the full amount of the petitioner's claim plus costs, or furnish bond for the full amount of the value of the property as determined at a hearing before the court or for the amount of petitioner's claim, including costs, whichever is less. If the writ is dissolved, the action shall proceed on petitioner's claim as if no writ had issued, and any issue requiring trial shall be held in accordance with the procedure prescribed for civil actions in courts of record [OCGA 44-14-268].

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### **3.67 Default:**

If valid service is made in compliance with OCGA 9-11-4 and Defendant fails to appear within time provided in OCGA 44-14-268, a default judgment shall be entered against Defendant for the full amount of petitioner's claim [OCGA 44-14-269].

### **3.68 Money Judgment OK - [242 Ga. 1, 2-3, 247 SE2d 743 (1978)].**

## **3.7 FORECLOSURE IN MAGISTRATE COURT FOR PRINCIPAL AMOUNTS NOT EXCEEDING \$100 - [OCGA 44-14-300 through 44-14-303]**

### **3.71 Filing Complaint:**

A party who seeks to foreclose a mortgage on personal property to secure a debt not exceeding \$100 in principal may make an affidavit of the amount of principal and interest due, attach it to the mortgage, and file it in the magistrate court in the county in which the mortgagor resides, if a Georgia resident, or if not a resident, in the county where the property is located. The magistrate shall issue an execution (not a summons) to the levying officer to execute a sale of the property to satisfy the principal, interest and costs [OCGA 44-14-300].

### **3.72 Notice and Answer:**

The magistrate must give immediate notice to the Defendant, which should be done by personal service or mail. OCGA 44-14-301. The mortgagor may avail himself/herself of any defense he/she may have to the foreclosure and in the same manner as in cases of foreclosure of chattel mortgages in superior courts [OCGA 44-14-303].

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### **3.8 FORECLOSURES OF BILLS OF SALE OR CONTRACTS RETAINING TITLE - [OCGA 44-14-280 through 44-14-282]**

#### **3.81 Same as Personal Property Foreclosure:**

An owner of a bill of sale or contract retaining title may foreclose in the same manner as mortgages on personal property [OCGA 44-14-280]. The procedures to foreclose are the same as other security interests [OCGA 44-14-281].

#### **3.82 Judgment:**

When judgment is rendered upon any note or evidence of debt and title is in vendor/Plaintiff, that party must make out a bill of sale transferring the property to Defendant. Upon recording of the bill of sale with the Clerk of the superior court, the property may be levied upon and sold. This lien takes priority over other liens [OCGA 44-14-282].



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